UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---X

MARIA ALVES, individually, and on behalf of all others similarly situated, :

Plaintiff, :

-against- :

AFFILIATED HOME CARE OF PUTNAM, INC., and BARBARA KESSMAN, in her individual capacity, :

:

Defendants.

---X

Civil Action No. 16-cv-1593 (KMK)

OPPOSITION TO MOTION FOR RECONSIDERATION AND REARGUMENT

Dated: Ossining, New York
March 7, 2017

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Civil Action No. 16-cv-1593 (KMK)

OPPOSITION TO MOTION FOR RECONSIDERATION AND REARGUMENT

Defendants AFFILIATED HOME CARE OF PUTNAM, INC. ("Affiliated"), and, BARBARA KESSMAN (and collectively, "defendants"), by their attorneys, Felsenfeld Legal, PLLC, offers this Opposition to plaintiff's Motion for Reconsideration and Reargument pursuant to Local Civil Rule of the Southern District of New York 6.3 and Federal Rules of Civil Procedure, Rule 59(e) ("Motion for Reconsideration").

ARGUMENT

> It is black letter law that a "motion for reconsideration may not be used to advance new facts, issues or arguments not previously presented to the Court, nor may it be used as a vehicle for relitigating issues already decided by the Court." *Davidson v. Scully,* 172 F. Supp. 2d 458, 461 (S.D.N.Y. 2001) *citing Shrader v. CSX Transp. Inc.,* 70 F.3d 255, 257 (2d Cir. 1995).
>
> Nat'l Union Fire Ins. Co. v. Las Vegas Prof'l Football L.P., 409 Fed. Appx. 401, 403, 2010 U.S. App. LEXIS 25865, *6 (2d Cir.).

In principal support of its Motion for Reconsideration, plaintiff opines at p. 1 of its accompanying brief, "[t]he question of the effective date of the Home Care Rule was not material to the requested relief in the motion." Defendants, for their part, as apparently did the Court, believed the date for which they as the employer might be held liable for overtime irrespective of the duties of such a personal care aide ("PCA"), to be of "material" concern in granting condition certification to plaintiff.

Defendants suggest that plaintiff's newly found "argument" for lookback to January 1, 2015, as defendants have heretofore never suggested, versus October 13, 2015, the date averred by defendants in their eighth affirmative defense that, based upon the effective date of the D.C. Circuit's holding in Home Care Ass'n of Am. v. Weil, 799 F.3d 1084 (2015), cert. denied, 136 S.Ct. 2506 (2016), and DOL's own pronouncements (e.g., see Exhibit H to the Affidavit of Barbara Kessman ("Kessman Aff."), appended to defendants' opposition to plaintiff's motion for conditional certification), all it employees had been compensated for overtime due; was, is and at all times has remained "material."

For whatever purposes plaintiff heretofore chose not to make that argument prior to its Motion for Reconsideration, it is axiomatic that "[a] motion for reconsideration is not intended as a vehicle for a party dissatisfied with the Court's ruling to advance new theories that the movant failed to advance in connection with the underlying motion" Scarsdale Cent. Serv. v. Cumberland Farms, Inc., 2014 U.S. Dist. LEXIS 86552, *6-7, 2014 WL 2870283 (S.D.N.Y.). Here, the prayer for reconsideration is confounded by the fact that defendants have argued since they initially interposed an answer to the complaint, without plaintiff offering an alternative or refutation, that the date of the change to the FLSA covering PCAs was effective October 13, 2013; to wit, defendants' sixth affirmative defense offers that "[p]rior to October 13, 2015, Overtime requirements did not apply to a PCA such as plaintiff."[1] Instead, plaintiff has freely and knowingly

[1] Defendants' original answer of May 2, 2016, and their amended answer, has offered this same sixth affirmative defense; yet, when plaintiff filed her amended complaint, such "amended" complaint failed, for whatever set of reasoning, to suggest or incorporate any countervailing date.

waited until nearly a year has passed to first suggest any earlier effective date; and then only after the Court had agreed with defendants' proffer.

Even if the Court were to believe that when plaintiff filed her moving papers to seek conditional certification she still lacked a clear enough view that such proposed effective date could be "material" for purposes of inclusion in her brief, i.e., somehow not making the connection between a prospective opt-in plaintiff and whether the applicable dates would hold relevancy to both those prospective plaintiffs and to the defendants; plaintiff then observed defendants had devoted three pages of their brief in opposition (offering at its point IV, and captioned in relevant part, "at all times prior to October 13, 2015 PCA's (and HHA's) were exempt from FLSA Overtime provisions," and forwarding at Exhibit H of the Kessman Aff. a copy of DOL guidance by the administrator of its Wage & Hour Division reminding employers such as Affiliated that notwithstanding the court directed enforcement date of October 13, 2015,[2] it was only "[a]s of Jan. 1, 2016, the rule is being fully enforced" by the DOL[3]). Notwithstanding, plaintiff made the continued determination, until disabused by the Court's Opinion and

[2] Whether the Court should accede to plaintiff's proffered January 1, 2015 as a matter of law, notwithstanding that these were "arguments not previously presented to the Court, [or] as a vehicle for relitigating issues already decided by the Court," the answer is clearly "no" as an October 13, 2015 "effective date" for a private cause of action has been considered and found appropriate by a number of federal district courts, e.g., Sanchez v. Caregivers Staffing Servs., 2017 U.S. Dist. LEXIS 11259 (E.D. Va.) (viewing the October 13, 2015 effective date versus backdating to January 1, 2015, the Sanchez Court found the "argument is unpersuasive because the DOL rule was a legal nullity during the time-frame for which Plaintiff seeks overtime pay," further observing, that "if the rule was given full retroactive effect, it would unfairly force employers to pay overtime compensation for hours worked when overtime pay for companionship services was not required from employers nor expected by employees"). See also Wengerd v. Self-Reliance, Inc., 2016 U.S. Dist. LEXIS 136885, *5-6, fn.10 (S.D. Ohio) (found that notwithstanding reversal by Home Care Ass'n of Am. v. Weil, two care worker employed until March 2015 were not to be afforded overtime coverage pursuant to the FLSA to January 1, 2015); Jasper v. Home Health Connection, Inc., 2016 U.S. Dist. LEXIS 71616, 2016 WL 3102226 (S.D. Ohio) (granting conditional certification of an FLSA class from October 13, 2015 forward); Bangoy v. Total Homecare Solutions, LLC, 2015 U.S. Dist. LEXIS 177859, *7-8, 2015 WL 12672727 (S.D. Ohio) (observing, *inter alia*, "the DOL has indicated that it will not bring enforcement actions violations that occurred before the Court of Appeals' reinstated the rule . . . strongly suggests that the rule should not be given retroactive effect in cases between private parties").

[3] The DOL guidance itself offers logical support suggesting that a private right of action was anticipated for "enforcement" from the "effective date" of October 13, 2015, and through December 31, 2015.

Order granting conditional certification, that defendants' argument regarding the effective date of enforcement was not worthy of so much as a footnote, indeed not even to so much as to dismiss defendants' argument as "immaterial" for purposes of her motion.

Plaintiff's consideration of an "issue" she admittedly spotted, but which she calculatedly, albeit erroneously, chose to dismiss as not "material," may not find relief by this Court by her Motion for Reconsideration, as it is well settled that a "moving party cannot introduce arguments not made in the challenged proceeding in h[er] motion for reconsideration." Hershey-Wilson v. City of New York, 2006 U.S. Dist. LEXIS 68116, *2-3, 2006 WL 2714709 (S.D.N.Y.) (Karas, J) (citation omitted).

CONCLUSION

Plaintiff's Motion for Reconsideration and Reargument should be denied.

Dated: Ossining, New York
March 7, 2017

Respectfully submitted,

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